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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RAY L. CORONA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When some of the predicate acts submitted to a jury in a RICO case are later determined to be legally invalid, may the RICO conviction be sustained and, if so, under what circumstances? There have been seventeen decisions by courts of appeals on this question, most of them in the last two years; and the decisions have spawned two separate conflicts. The decision below conflicts with decisions in the Second, Fourth and Eighth Circuits. This Court should hear this issue and establish a uniform rule throughout the federal system.

2. When the evidence at a first trial ending in a hung jury was legally insufficient, may defendant raise this issue on appeal following a conviction at a second trial? *Richardson v. United States*, 468 U.S. 317 (1984) holds that the defendant may not appeal on the insufficiency issue *between* trials. But the court below used *Richardson* as a basis for refusing to consider the issue on appeal at all.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, petitioner Ray L. Corona's father, Rafael L. Corona, was a party in the proceedings below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
Facts	2
The Verdict	3
The Decision Below	5
REASONS FOR GRANTING THE WRIT	7
I. THIS RICO ISSUE HAS SPAWNED SEVENTEEN COURT OF APPEALS DECISIONS TO DATE; TWO SQUARE CONFLICTS, ONE INVOLVING THIS CASE, HAVE DEVELOPED; AND THE COURTS OF APPEALS ARE ALMOST UNIFORMLY MISAPPLYING RICO'S "PATTERN" REQUIREMENT	7
A. The Decision In This Case Conflicts With Decisions In The Second Circuit, Fourth Circuit And Eighth Circuit	8
B. The Conflict Noted In *McCulloch v. United States*, 484 U.S. 947 (1987), Still Exists	11
C. With The Exception of *United States v. Brown*, The Courts Of Appeals Have Uniformly Ignored This Court's Pronouncements In *H.J.* And *Sedima*	12
D. Certiorari Should Be Granted	14

TABLE OF CONTENTS—Continued

Page

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DEFENDANT MAY RAISE ON APPEAL *AFTER* CONVICTION THE QUESTION WHETHER EVIDENCE AT A FIRST TRIAL ENDING IN A HUNG JURY WAS INSUFFICIENT.... 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: Page

Brennan v. United States, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989) 7, 11
Callanan v. United States, 881 F.2d 229 (6th Cir. 1989), *petition for cert. pending*, Docket No. 89-6203 (filed December 1, 1989) 7, 8, 9
Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987) 7, 11
H J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893 (1989) 8, 13
McCulloch v. United States, 484 U.S. 947 (1987) .. 11, 12, 14
McNally v. United States, 483 U.S. 350 (1987) 4, 9, 10
Northern v. United States, 300 F.2d 131 (6th Cir. 1962) 16
Richardson v. United States, 468 U.S. 317 (1984) .. 15, 16, 17
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 8, 13
United States v. Alexander, 850 F.2d 1500 (11th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3236 (1989), *on remand*, 888 F.2d 777 (11th Cir. 1989) 7, 11, 13, 14
United States v. Anderson, 809 F.2d 1281 (7th Cir. 1987) 7, 11
United States v. Balano, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980) 16
United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981) 16
United States v. Bodey, 607 F.2d 265 (9th Cir. 1979) 16
United States v. Brown, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) 7, 12, 13, 14
United States v. Corona, 885 F.2d 766 (11th Cir. 1989) 7
United States v. Erwin, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986) 7, 11
United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988) 7, 10
United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963) 16

TABLE OF AUTHORITIES—Continued

Page

United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) 7, 8, 9
United States v. Lopez, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) 7, 11
United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989) 7, 8, 10
United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989) 7
United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983) 7, 11, 13, 14
United States v. Pepe, 747 F.2d 632 (11th Cir. 1984) 7, 11, 13
United States v. Rey, 641 F.2d 222 (5th Cir.), *cert. denied*, 454 U.S. 811 (1981) 16
United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983), *rev'd*, 468 U.S. 317 (1984) 16
United States v. Ruggiero, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) 7, 8, 9
United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979) 16
United States v. Young, 544 F.2d 415 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976) 16
United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989) 7

STATUTES:

18 U.S.C. § 1341 (1982) 3
18 U.S.C. § 1952(a)(1) (1982) 6
18 U.S.C. § 1952(a)(3) (1982) 3, 6
18 U.S.C. §§ 1961 *et seq.* (1982 and Supp. V 1987) .....*passim*
28 U.S.C. § 1254 (1982) 2

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RAY L. CORONA,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Ray L. Corona, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals, dated September 29, 1989 and reported at 885 F.2d 766 (11th Cir. 1989) (Roney, C.J., Evans and Vance, J.J., Vance, J. dissenting), appears in the Appendix hereto at pages 1a-18a. The Court of Appeals decision dated November 13, 1989 denying a petition for rehearing appears in the Appendix at pages 19a-20a. The order of the District Court partially vacating the jury's verdict is contained in the Appendix at pages 21a-23a.

JURISDICTION

Petitioner Ray L. Corona's convictions under the Racketeer Influenced and Corrupt Organization Act ("RICO") were affirmed in an Opinion of the Court of Appeals dated September 29, 1989. *See* App. at 18a. Timely petitions for rehearing and suggestion for rehearing en banc were denied November 13, 1989. *See* App. at 19a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1982) and Supreme Court Rule 20.1.

STATUTORY PROVISION INVOLVED

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (1982 and Supp. V 1987), set forth in its entirety in the Appendix at pages 24a-44a.

STATEMENT OF THE CASE

Facts

Petitioner Ray L. Corona and his father Rafael L. Corona are bankers who came to this country from Cuba in 1961. In 1977 and 1978 Ray Corona helped arrange the purchase of the Sunshine State Bank in Miami, Florida ("the bank") by two foreign investors. The Coronas became managers of the bank following its acquisition and also received some bank stock.

The government's case against the Coronas arose out of evidence that one of the foreign investors was a nominee for a Miami marijuana dealer named Jose Antonio Fernandez ("Fernandez"). The government claimed that Ray Corona helped Fernandez invest in the bank, concealing his identity from Florida bank regulators; and that Ray Corona helped Fernandez while Fernandez was a fugitive on drug charges in 1981, by arranging the repurchase of some of Fernandez' bank stock.

Corona was brought to trial on an indictment filed on December 20, 1985.[1] Counts III, IV and V charged Corona with using the mails in furtherance of a scheme to defraud the Florida bank regulators, in violation of 18 U.S.C. § 1341 (1982). Counts VI and VII charged Corona with facilitating the promotion of a marijuana business, in violation of 18 U.S.C. § 1952(a)(3) (1982) ("the Travel Act"), in that he helped Fernandez redeem his stock while Fernandez was a fugitive.

Finally, Counts I and II charged that Corona violated and conspired to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) and (d) (1982), ("RICO"). Each RICO count alleged that petitioner Ray Corona committed eleven predicate crimes, and that these predicate crimes constituted a "pattern" of racketeering activity.

The eleven predicate crimes may be divided into two categories. Five predicate crimes were charged separately in the indictment as Counts III through VII; and six were not charged separately. The five predicates which were separately charged in Counts III through VII all related to events occurring after Fernandez' arrest in 1981. The remaining six predicates, three mail frauds and three Travel Act violations, all occurred in 1977 and 1978 when the bank was first acquired.

The Verdict

The jury returned a general verdict of guilty on the RICO counts without specifying which of the predicate crimes it found to have been committed. The jury did return guilty verdicts on Counts III through VII, however, indicating its finding that the five corresponding

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[1] An earlier indictment was filed on December 11, 1984. Trial on that indictment ended in a hung jury on October 7, 1985. *See infra* at pp. 17-20. The government also brought charges against Corona's father, Rafael. However, all charges against Rafael Corona were dismissed either by the trial judge for legal reasons or by the Court of Appeals for insufficient evidence. *See* App. at 18a, 22a.

predicate acts—all occurring in 1981—had been established.

Four of those five predicate acts have since been ruled invalid. The trial judge dismissed the three mail frauds charged in Counts III, IV and V, and invalidated all six mail frauds charged as predicate crimes in the RICO counts. App. at 22a.[2] And the court of appeals reversed Corona's conviction on one of the Travel Act counts—Count VI—for insufficient evidence. App. at 18a.

Seven of the original eleven predicate crimes charged in the RICO counts have now been ruled invalid. Only four legally valid RICO predicates remain. As to one, the Travel Act violation charged as Count VII, the jury has convicted. As to the other three, the jury has made no findings. A chronological list of the predicate crimes alleged against Ray Corona in the indictment, and the disposition of those crimes, is set forth in a footnote for the Court's assistance. The single valid predicate on which the jury made a finding is underscored.[3]

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[2] The District Court acted on the authority of *McNally v. United States*, 483 U.S. 350 (1987), which was decided two days after the jury's verdict.

[3] Acts of Racketeering Naming Ray Corona

Date	Nature	Jury Action	Validity
12/21/77	Travel Act	Unknown	Legally valid
1/19/78	Mail Fraud	Unknown	Invalid
5/10/78	Travel Act	Unknown	Legally valid
5/16/78	Travel Act	Unknown	Legally valid
5/19/78	Mail Fraud	Unknown	Invalid
5/7/79	Mail Fraud	Unknown	Invalid
April, 1981	Travel Act	Convicted, see Count VI	Invalid
6/30/81	Mail Fraud	Convicted, see Count III	Invalid
12/22/81	Travel Act	Convicted, see Count VII	Legally valid
1/3/82	Mail Fraud	Convicted, see Count IV	Invalid
4/22/82	Mail Fraud	Convicted, see Count V	Invalid

The Decision Below

In his briefs on appeal, which were written *before* the Court of Appeals invalidated one of the two Travel Act counts on which he had been convicted, Corona argued that a new trial was required on the RICO counts because it was impossible to tell whether or not the jury's finding of a "pattern" of racketeering was based in part on the invalid mail fraud predicates. *See* Corona brief on appeal at pp. 63-65.

In his petition for rehearing, written *after* the Court of Appeals invalidated one of his two Travel Act convictions, Corona pointed out that there is now no way to know whether the jury found that he committed two legally valid predicate acts. The jury surely found that he committed one—the Travel Act violation charged in Count VII. But the jury has made no finding on any of the other valid predicates.

Over a dissent by Judge Vance, the Court of Appeals rejected Corona's argument that he was entitled to a new trial on the RICO counts. The court said, "[t]he district court dismissed the mail fraud predicates and we today reverse one of the Travel Act predicates. This leaves four predicate acts . . . ." App. at 16a. The court then conceded that only one of the four remaining predicate acts "was charged separately in a Travel Act count and resulted in a conviction." *Id.* But the court opined that the jury "could not *reasonably* have relied on the now-dismissed mail fraud" counts without also finding Corona guilty of the three remaining valid Travel Act predicates. *Id.* at 17a (emphasis added).

Thus, without any finding by a jury that Corona committed these predicate crimes, the Court of Appeals *inferred* that the jury would have convicted Corona on them because an acquittal would have been "unreasonable." This places the Eleventh Circuit in conflict with

the law in three other circuits. *See infra* at pp. 8-10. As those circuits hold, only a jury can decide whether a defendant committed the predicate crimes alleged in a RICO count. A court of appeals cannot substitute its own verdict for that of the jury, nor may it guess at the verdict the jury would have rendered if it had been asked.[4]

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[4] Here, the error of the Court of Appeals in substituting its judgment for that of the jury is especially clear. The valid RICO predicates on which the jury made no findings occurred in 1977 and 1978, whereas all the separately charged counts on which the jury convicted related to events in 1981 or 1982. The legally valid RICO predicates on which the jury made no findings involved at least three contested fact issues very different from the issues presented by the counts on which the jury convicted. The unresolved fact issues presented by the earlier predicates are as follows:

1) Corona put in proof that Fernandez in fact never owned stock in the bank until 1980, long after the three uncharged Travel Act predicates occurred. Corona received a specific jury instruction on this aspect of his defense. *See* Appendix on appeal at p. 168. The verdicts on Counts III-VII shed no light on how the jury found on this point.

2) There was cogent proof that Corona did not know Fernandez was a marijuana dealer until after Fernandez was arrested in 1981. Thus, the prosecuter told the jury in his rebuttal summation that Fernandez never testified that Corona "knew about the drugs" because "it is not true. He couldn't tell you that." (R65:130). Corona's knowledge that Fernandez was a drug dealer is an essential element of the Travel Act violations allegedly occurring in 1977 and 1978; and the jury's finding of guilt on Travel Act violations occurring *after Corona learned of Fernandez' arrest on a drug charge in 1981*, tells nothing about Corona's knowledge of Fernandez' drug business in 1977 and 1978.

3) The three old uncharged Travel Act predicates were brought under a different subsection of the Travel Act, 18 U.S.C. § 1952 (a)(1), from Counts VI and VII, which were brought under 18 U.S.C. § 1952(a)(3) (1982). The old uncharged Travel Act predicates alleged that the money used to purchase the bank constituted a "distribution" of the proceeds of a marijuana business. 18 U.S.C. § 1952(a)(1) (1982). "Distribution" is an element of any violation of 18 U.S.C. § 1952(a)(1), and it is a term of art. According to the Court of Appeals opinion, App. at 15a, a distribution occurred in this case only if Corona received his bank stock for helping the

REASONS FOR GRANTING THE WRIT

I. THIS RICO ISSUE HAS SPAWNED SEVENTEEN COURT OF APPEALS DECISIONS TO DATE; TWO SQUARE CONFLICTS, ONE INVOLVING THIS CASE, HAVE DEVELOPED; AND THE COURTS OF APPEALS ARE ALMOST UNIFORMLY MISAPPLYING RICO'S "PATTERN" REQUIREMENT

The issue in this case is whether and under what circumstances a RICO conviction may be affirmed if some, but not all, of the predicate acts submitted to the jury are later declared invalid. This issue is bedeviling the courts of appeals. It has arisen in seventeen cases;[5] it has spawned two separate conflicts; and in addressing this issue, every circuit except the Third has ignored this

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marijuana business, rather than for arranging the bank's purchase and functioning as its manager. The jury was never instructed on, nor did it make a finding on, this issue.

[5] *United States v. Corona*, 885 F.2d 776 (11th Cir. 1989); *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989); *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989); *Brennan v. United States*, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989); *United States v. Alexander*, 850 F.2d 1500 (11th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3236 (1989); *United States v. Alexander*, 888 F.2d 777 (11th Cir. 1989) (decision on remand); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989); *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); *Cooper v. United States*, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987); *United States v. Anderson*, 809 F.2d 1281 (7th Cir. 1987); *United States v. Erwin*, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984); *United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d Cir. 1984), *cert. denied*, 469 U.S. 831 (1984); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983); *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Lopez*, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987).

Court's pronouncements in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

A. The Decision In This Case Conflicts With Decisions In The Second Circuit, Fourth Circuit, And Eighth Circuit

It is undisputed that seven invalid predicate acts were submitted to the jury in connection with the RICO counts in this case, and that the RICO conviction can be affirmed only if the record shows that the jury based its verdict on the other four valid predicates. The court below affirmed Corona's RICO convictions even though the jury had made an express finding of guilt on only one of these four valid predicate acts. Although the jury expressed no finding on the other three, the Court of Appeals inferred findings of guilt because it thought the jury "could not *reasonably*" have acquitted. App. at 17a.

This decision conflicts with the law in the Second, Fourth and Eighth Circuits.[6] Cases in those circuits hold that where invalid predicates are erroneously submitted to the jury, a RICO conviction must be reversed unless the jury made *express* findings of guilt on at least two valid predicates. Only a jury can find a defendant to have committed a predicate crime, and these circuits forbid an appellate court to speculate on what a reasonable jury would have found.[7]

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[6] *See United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987).

[7] It would appear that the decision of the Sixth Circuit in *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989), also conflicts with the law in the Second, Fourth and Eighth Circuits. There, a state judge was charged with and convicted of a RICO violation. The predicate acts were seven briberies and several mail

Thus, in *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987), a single predicate crime had erroneously been charged in a RICO indictment as two separate predicate acts. Several other valid predicates were charged in the indictment. But the Eighth Circuit reversed the RICO conviction because the single predicate crime had been submitted to the jury as two predicate acts; and there was no way to know whether the jury had based its verdict exclusively on these two duplicitously charged acts. The Eighth Circuit said:

> Although evidence of many other predicate acts was strong, we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed.

830 F.2d at 861. The *Kragness* court viewed the possibility that the jury exonerated the defendant of the other predicate acts as "unlikely," but said:

> [I]n a criminal case a conviction may not be upheld on the basis of speculation or inference, however strong, of this kind. It is the jury that must convict, not an appellate court.

Id.

In *United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984), the Second Circuit ruled on appeal that one of the predicate acts alleged in a RICO count, a gambling conspiracy, was not a valid predicate act under RICO. The other seven predicates were valid. But there was no special verdict, and the defendant at issue had been separately convicted of

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frauds. The mail fraud predicates were later ruled invalid under *McNally v. United States*, *supra*. The jury had returned no special verdicts, and the briberies were not separately charged. The Sixth Circuit nonetheless affirmed the RICO conviction on the ground that the jury had found a co-defendant—the alleged "bagman"—guilty of RICO based solely on the bribery predicates. A petition for a writ of certiorari in *Callanan* is pending before this Court under Docket No. 89-6203.

only one of the valid predicates. Accordingly, the Second Circuit reversed the RICO conviction saying, with respect to the valid predicate acts:

> For all we know, the jury may have found he committed more than two, possibly even all eight. However, absent some indication by the jury that its determination of guilt rested on two or more predicate acts that are legally sufficient, we are required to reverse the conviction because the legally insufficient predicate act relating to gambling *may* have been necessary to the verdict.

Id. at 921. (emphasis added).

In *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989), the defendant had been convicted of a RICO count charging as predicate acts two state bribery offenses and several mail frauds. The mail fraud predicates were later ruled invalid on authority of *McNally v. United States*, *supra*. The Fourth Circuit then held that the RICO convictions had to be set aside even though two valid bribery predicates remained:

> [S]ince we may not know whether the mail fraud or bribery charges . . ., or both, were considered by the jury [on the RICO conviction], that conviction . . . must be vacated.

Id. at 1074.[8]

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[8] *See also United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988). In *Holzer*, the defendant was convicted of several mail frauds, one extortion count, and RICO. The RICO count included mail fraud and bribery predicates. The court invalidated the mail fraud convictions and then also granted a new trial on the RICO count:

> [T]he only predicate offenses . . . other than the single predicate extortion count, that we can be sure the jury convicted Holzer of were the mail fraud offenses.

840 F.2d at 1352.

B. The Conflict Noted In *McCulloch v. United States*, 484 U.S. 947 (1987), Still Exists

A second conflict remains unresolved. This second conflict was specifically noted in dissents from denial of certiorari in *McCulloch v. United States*, 484 U.S. 947 (1987). Several circuits have ruled that when invalid predicates are submitted to a jury, the RICO conviction may always be affirmed if the jury made express findings of guilt on two valid predicates. But the Third Circuit has ruled to the contrary, noting that the invalid predicates may still have influenced the jury in finding a "pattern" of racketeering activity.

Thus, the Second, Fifth, Seventh, Ninth and Eleventh Circuits have held that RICO convictions will be affirmed so long as the jury made an express finding on two valid predicates, either by convicting on corresponding substantive counts or by rendering special verdicts. *See, e.g., Brennan v. United States*, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989) (several valid predicates were the subject of convictions when separately charged as substantive offenses; RICO convictions affirmed); *United States v. Lopez*, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) (four valid predicates were the subject of convictions when separately charged as substantive offenses; RICO convictions affirmed); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983) (same); *United States v. Anderson*, 809 F.2d 1281 (7th Cir. 1987) (same); *United States v. Erwin*, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986) (same); *Cooper v. United States*, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987) (same); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984) (same); *United States v. Alexander*, 850 F.2d 1500 (11th Cir. 1988) (two valid predicates were the subject of a special verdict).

However, the Third Circuit in *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), reversed a RICO conviction when two of the predicate acts were ruled invalid on appeal, even though two others were separately charged in counts on which the jury returned guilty verdicts. 583 F.2d at 669.

The Court in *United States v. Brown, supra*, said that the RICO count charged "defendants with operating their business through a pattern of racketeering activity," and agreed with the defendant's position that "it is impossible to determine on which" predicates the jury relied in reaching its verdict on the RICO counts. *United States v. Brown*, 583 F.2d at 669. The decision in *Brown* thus conflicts with the decisions in the cases set forth above, decided in the Second, Fifth, Seventh, Ninth and Eleventh Circuits.[9]

The instant case presents the issue involved in this conflict. Corona argued on appeal that the dismissal of the mail fraud predicates alone warranted a new trial because the jury may have relied on them in finding a *pattern* of racketeering activity. *See* Corona brief on appeal at pp. 63-65. Corona will argue to this Court if certiorari is granted that—whether or not the jury found him guilty of two valid predicates—the invalid mail fraud predicates may have influenced the jury's finding that there was a "pattern" of racketeering activity.

C. With The Exception Of *United States v. Brown*, The Courts Of Appeals Have Uniformly Ignored This Court's Pronouncements In *H. J.* And *Sedima*

Although *United States v. Brown*, is in the minority, it is correctly decided; and the cases decided in the Second, Fifth, Seventh, Ninth and Eleventh Circuits are incorrectly decided. One of the elements of a RICO viola-

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[9] This conflict was noted by Justices White and Brennan in their dissent from denial of certiorari in *McCulloch v. United States*, 484 U.S. 947 (1987).

tion is that the defendant engage in a "pattern" of racketeering activity. This Court has held twice, in recently decided cases, that to prove a "pattern" of racketeering activity the government must prove more than that a defendant committed two predicate acts. The government must also prove that the predicate acts are linked as part of a "pattern": that the different predicate acts are related and pose a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2900 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

The decisions which conflict with *United States v. Brown*, uniformly ignore this proposition. Each assumes that the RICO convictions were unaffected by the invalid predicates so long as the jury made findings that the defendant committed at least two valid predicates.[10] None even considers the question whether some of the invalidated predicates may have been the basis for the jury's *pattern* finding.

The only case to give any discussion of the pattern requirement, other than *United States v. Brown*, was *United States v. Alexander*, 888 F.2d 777 (11th Cir. 1989). The Eleventh Circuit considered the issue in *Alexander* only because this Court vacated the earlier decision in *Alexander* and remanded with directions that the Eleventh Circuit reconsider its decision in light of *H.J. Inc. v. Northwestern Bell, supra. See United States v. Alexander*, 109 S. Ct. 3236 (1989). But instead of analyzing the question of whether the *jury* was influenced in its pattern finding by the invalid predicate, the court

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[10] In fact, the Court in *Peacock* expressly and erroneously states "'the two or more predicate crimes . . . need not be related to each other,'" 654 F.2d at 348 (citation omitted). Similarly, in *Pepe*, the court states, "the government proved at least two predicate acts of racketeering beyond a reasonable doubt. This is all the government had to prove to establish a RICO pattern . . . ." 747 F.2d at 668.

of appeals in *Alexander* invaded the jury's exclusive province and made its own findings that there was a pattern.[11]

D. Certiorari Should Be Granted

In *McCulloch v. United States*, 484 U.S. 947 (1987), two Justices of this Court voted to grant certiorari on the "question of whether a RICO conviction may stand when some—but not all—of a defendant's convictions for the predicate acts which are the basis of his RICO conviction are vacated." *Id.* at 948. Justices White and Brennan emphasized that there was a conflict on this question between the Fifth Circuit's decision in *United States v. Peacock*, *supra*, and the Third Circuit's decision in *United States v. Brown*, *supra*. See pp. 13-14, *supra*. They concluded that "[b]ecause of the disagreement and uncertainty among the courts of appeals over the proper application of this important federal criminal statute" certiorari should be granted. 484 U.S. at 948.

At the time of *McCulloch*, there had been only a few court of appeals decisions on this issue. There have now been seventeen decisions in the courts of appeals on the question presented in *McCulloch*. The conflict noted by Justices White and Brennan has not been resolved and a second conflict has emerged. *See* pp. 9-17, *supra*. Moreover, the decisions by the courts of appeals are studiously ignoring this Court's repeated pronouncements concerning RICO's "pattern" requirement. It is time for this Court to step in and establish a uniform rule.

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[11] Referring to the "pattern" requirement, the court in *Alexander* said:

> *We* find sufficient likelihood that . . . [defendant] would have also continued these sorts of activities.
>
> . . .
>
> *We* also find that Alexander's predicate acts were sufficiently related under the Supreme Court's test in Northwestern Bell.
>
> . . .
>
> Thus *we* find the pattern of activity the Supreme Court requires in order to support Alexander's conviction.

United States v. Alexander, 888 F.2d at 778 (11th Cir. 1989) (emphasis added).

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DEFENDANT MAY RAISE ON APPEAL *AFTER* CONVICTION THE QUESTION WHETHER EVIDENCE AT A FIRST TRIAL ENDING IN A HUNG JURY WAS INSUFFICIENT

Ray Corona was first tried in 1985 on the RICO counts under the original indictment filed December 11, 1984. The RICO counts in the earlier indictment did not include the two Travel Act predicates occurring in 1981. In the original indictment, the only predicate acts alleged to have occurred within the applicable five year statute of limitations period were the invalid mail frauds.

At the close of the evidence at the trial on the original indictment, Corona moved for a judgment of acquittal. In light of the invalidity of the mail fraud counts, and the absence of any other predicate crimes occurring within the limitations period, the motion should have been granted. The government has not argued otherwise. Instead, the motion was erroneously denied, and the case submitted to a jury. When the jury was unable to reach a verdict, a mistrial was declared.

Corona was retried in 1987 on a superseding indictment filed December 20, 1985. This indictment included the same RICO counts that were in the first indictment, with the two 1981 Travel Act predicates added. Trial on this indictment resulted in conviction on the RICO counts. On appeal from that conviction, Corona argued that the denial of his motion for a judgment of acquittal at the end of the first trial was error. The Court of Appeals refused to decide this question on the ground that this Court's decision in *Richardson v. United States*, 468 U.S. 317 (1984) required affirmance even if the motion for a judgment of acquittal at the end of the first trial should have been granted. App. at 15a-16a.

But *Richardson* involved the question whether a defendant could appeal *between trials*. The instant case

presents the question whether a defendant may ever seek relief on appeal from the erroneous denial of a motion for a judgment of acquittal at a trial ending in a hung jury. *Richardson v. United States*, *supra*, did not decide the issue presented in this case.

At the time of *Richardson*, the courts of appeals uniformerly held that the insufficiency of evidence at a first trial ending in a hung jury could be raised when the defendant appealed from a later conviction.[12] The issue in *Richardson*—one on which the circuits were then divided—was whether a defendant could use the double jeopardy clause as a way to appeal between trials in spite of the fact that no final order had been entered.

The Court of Appeals for the District of Columbia Circuit in *Richardson* held that the order denying the motion for a judgment of acquittal was not appealable, and concluded, "we hold that [the defendant] is not entitled to appellate review of the trial courts' double jeopardy claim *at this time*." *United States v. Richardson*, 702 F.2d 1079, 1080 (D.C. Cir. 1983) (emphasis added).

This Court granted certiorari to resolve the conflict among the Circuits. *Richardson v. United States*, 468 U.S. at 320. This Court then held that the double jeopardy issue was appealable but rejected it on the merits because the first jeopardy had never terminated. This Court concluded that, "[r]egardless of the sufficiency of

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[12] *United States v. Balano*, 618 F.2d 624, 632 n.13 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980) (holding); *United States v. Bodey*, 607 F.2d 265, 267-68 (9th Cir. 1979) (holding); *United States v. Wilkinson*, 601 F.2d 791, 794-95 (5th Cir. 1979) (holding); *United States v. Rey*, 641 F.2d 222, 225 (5th Cir.), *cert. denied*, 454 U.S. 811 (1981) (dictum); *United States v. Becton*, 632 F.2d 1294, 1297 (5th Cir. 1980), *cert. denied*, 454 U.S. 837 (1981) (dictum); *United States v. Young*, 544 F.2d 415, 418 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976) (dictum); *United States v. Kaufman*, 311 F.2d 695, 698-99 (2d Cir. 1963) (dictum); *Northern v. United States*, 300 F.2d 131, 132 (6th Cir. 1962) (dictum).

the evidence at petitioner's first trial, he has no valid double jeopardy claim *to prevent his retrial*." *Richardson v. United States*, 468 U.S. at 326 (emphasis added; footnote omitted).

This Court did not indicate anywhere in its opinion whether an appellate court should review the issue of the insufficiency of the evidence at the first trial when a defendant appeals from a conviction at a second trial. The Court did not cite, much less reject, the numerous courts of appeals' decisions holding that the issue of insufficiency at the first trial would be reviewable after a final judgment. *See* note 12, *supra*. This Court simply never reached that issue in *Richardson*.

Corona properly moved for a judgment of acquittal at the first trial; and he was legally entitled to have that motion granted. He never took any subsequent action which could be construed as a waiver of that entitlement. Quite apart from the double jeopardy clause, it is generally true in criminal cases that an appellate court will put a defendant in the position he would have been in if the district court had applied the law correctly. Consequently, we submit that the Court of Appeals should have addressed and resolved Corona's claim that he was entitled to an acquittal on the RICO counts at his first trial. In any event, *Richardson* did not address this issue, and certiorari should be granted to resolve it.

CONCLUSION

For all the above stated reasons, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 3, 1990

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5952

(D.C. Docket No. 84-00853CR)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

RAFAEL L. CORONA, RAY L. CORONA,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 29, 1989)

Before RONEY, Chief Judge, VANCE, Circuit Judge, and EVANS *, District Judge.

RONEY, Chief Judge:

Defendants Ray Corona and his father, Rafael Corona, were convicted of Travel Act, mail fraud, and racketeering (RICO) charges. Ray Corona was also convicted of

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* Honorable Orinda D. Evans, U.S. District Judge for the Northern District of Georgia, sitting by designation.

RICO conspiracy. Two days after the verdicts, the Supreme Court decided *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). Pursuant to *McNally*'s limitations on the applicability of the mail fraud statutes, the district court dismissed the mail fraud counts and the mail fraud predicate acts in the RICO count, which resulted in dismissal of the RICO count as to Rafael, but not as to Ray. Rafael then stood convicted of only a Travel Act violation. The defendants appeal the remaining convictions, raising claims of insufficiency of evidence, double jeopardy, and "spill-over" effect from the dismissed mail fraud charges. We reverse as to Rafael Corona on the ground there was insufficient evidence to support the Travel Act violation. Although the court is divided in two respects, we affirm in part and reverse as to Ray Corona.

Background

The Coronas' initial trial ended in a mistrial after the jury was unable to reach a verdict as to either of them. The Government obtained a superseding indictment, which the defendants sought to have dismissed on double jeopardy grounds. The district court denied the motion to dismiss, and this Court affirmed the denial in an interlocutory appeal. *United States v. Corona*, 804 F.2d 1568 (11th Cir. 1986), *cert. denied*, 481 U.S. 1017, 107 S.Ct. 1896, 95 L.Ed.2d 503 (1987).

On retrial, the Government's evidence showed that Jose Antonio Fernandez, a Cuban-born United States resident, initially became involved in the marijuana "brokerage" business as a low level employee of Jose Alvaro-Cruz. A "broker" in the drug trade is a middle-man who for a fee will take on a consignment basis large shipments of drugs smuggled into this country to find a buyer for them.

In 1976 Ray Corona was Senior Vice President of the Total Bank in Miami. Rafael Corona was President of the bank. Fernandez and Ray Corona met through

Alvaro-Cruz. At that time, Fernandez was starting a boutique and had virtually no source of legitimate income since the business was barely meeting operating expenses. Ray became banker for Fernandez, as well as for several of Fernandez's associates in the marijuana trade. Fernandez wanted Visa and American Express gold cards. Since he had no credit history, Ray required him to deposit $20,000. Fernandez delivered the money in cash wrapped in a paper bag.

According to Fernandez, he and his associates in the drug trade, who also banked at the Total Bank, would visit Ray and discuss "what they were doing. * * * They would joke about it. * * * [They would discuss] how much money they made. * * * [Fernandez] thought Ray came to look at [him] like part of the group." Steve Samos and Ivan Robles were Fernandez's money launderers, working out of Panama. Fernandez owned several off-shore "shell companies" in Panama and the Grand Cayman Islands through which his money was laundered.

In 1977 Fernandez, who the previous year had virtually no legitimate income and no credit history, began discussing with Ray the possibility of buying a bank. Fernandez, Alvaro-Cruz, and Ray discussed the matter at Ray's office. Initially, Alvaro-Cruz, and Fernandez proposed that each of them would contribute half the money necessary, but Alvaro-Cruz withdrew from the plan when Ray wanted a 15% share without contributing any money.

Ray Corona, Samos, and Fernandez were aware that Fernandez could not buy a bank under his own name due to the close scrutiny that the Comptroller of Currency would give to the proposed purchaser. Therefore, they agreed to use Alma Robles, Samos's ex-wife who was from an influential family in Panama, as the nominee or "figurehead" buyer. Ray located a bank and told Fernandez that he would need to produce $500,000 as

earnest money. Fernandez gave Ray $500,000 cash. The first attempt to buy a bank was unsuccessful. Ray later told Fernandez that he could probably purchase a majority interest in the Sunshine State Bank in Miami for about $2,000,000.

Ray quit his job at the Total Bank before the Sunshine State Bank purchase was complete. Fernandez gave him a $200,000 personal loan to buy a new house and car. Fernandez, Samos, and Ray Corona were at Fernandez's Ocala horse ranch they they learned that the Sunshine State Bank purchase had been approved. After celebrating, Fernandez took $1,000,000 cash out of his safe and gave it to Ray and Samos, who took it with them back to Miami. Samos then took the money to Panama and laundered it by transferring it through numerous accounts to disguise its source. Finally, he disbursed it from Alma Robles' account and wired it back to Ray to make the purchase.

Ray Corona was made President and Chairman of the Board of the bank. Later, Rafael Corona left the Total Bank and became Chairman of the Board at the Sunshine State Bank. Ray continued as President.

Fernandez treated the bank as an investment. Although he purchased it with laundered drug proceeds, he did not launder money through it after the purchase. On Ray's recommendation Fernandez started the Cumberland Management Company as a "front" for investment purposes and established his office near the bank. Bank employees had a rubber stamp of Fernandez's signature and covered several substantial overdrafts which occurred when he was out of town.

Fernandez gave numerous presents to bank employees, including gifts to Ray Corona of two large-screen televisions valued at between three and five thousand dollars. Ray and Fernandez were social friends as well as business associates. Ray visited Fernandez's home several

times, dined with him and his wife occasionally, borrowed his boat often, and sponsored him for membership in a yacht club. Eventually the friendship soured as Fernandez perceived a threat to his bank investment in Ray's erratic, extravagant lifestyle (driving a Rolls Royce, purchasing mink coats, and getting in fights at a night club).

Fernandez had stepped into the leadership void in the drug business left when Alvaro-Cruz moved to Spain due to "tax problems." Within about two years Fernandez owned a 50-acre Ocala, Florida horse ranch worth $1,000,000, seven beach-front acres including three buildings at Vero Beach, several other properties, and a $90,000 boat, all bought with his drug earnings.

Tino Guevara was Fernandez's brother-in-law and partner in the marijuana trade. In late 1979 and early 1980, after Guevara's arrest, Fernandez, already having accumulated great wealth, began to consider retiring from the drug "brokering" business. He told Ray of his thoughts of selling the bank. Ray wanted time to arrange for him and his father to buy it themselves.

Between 1976 and 1981 Fernandez made approximately five to seven million dollars "brokering" 43 shipments of marijuana totalling 1.3 million pounds worth about $200,000,000. In March 1981, soon after "brokering" what turned out to be his last shipment of marijuana, Fernandez was arrested on a federal indictment in New Orleans. Ray flew to New Orleans to visit Fernandez, ostensibly to assist with bail. Fernandez sent Ray away for fear that federal prosecutors might figure out Fernandez's relationship to the Sunshine State Bank. Back in Miami, however, Ray contacted Guido Escheverria, a bank customer who had never met Fernandez, and persuaded him to withdraw a $100,000 certificate of deposit (even though the bank held it as collateral for an $89,000 loan) and fly to New Orleans to help Fernandez make bail.

After Fernandez's release on bail, he and his family were kidnapped by Colombian marijuana suppliers and taken to Colombia until he repaid several million dollars owed for prior drug shipments which had been taken on consignment and for which his associates had failed to pay the Colombians while Fernandez was in jail. The Colombians forced Fernandez to liquidate most of his holdings through Samos, as they essentially stripped Fernandez of his wealth.

During his captivity Fernandez was repeatedly in contact with Samos and Ray. They were negotiating for Ray and Rafael to buy Fernandez's 49,900 shares of bank stock. For the first 20,000 they sent $200,000 and a promissory note for $420,000. Ray also gave Fernandez's wife $50,000 and a car when the Colombians released her for a short time and allowed her to travel to Miami. In August 1981 Fernandez managed to escape first to Costa Rica, then to Spain, and finally to Brazil.

He continued through Samos and Ivan Robles trying to sell his remaining interest in the bank and succeeded in getting an additional $200,000 from the Coronas for 9,900 shares. In their negotiations the Coronas deducted amounts for expenses related to the New Orleans bail matter and the $50,000 previously given to Mrs. Fernandez.

Samos provided Fernandez a fake name and counterfeit documents while he was a fugitive. Ray provided Visa and American Express gold cards issued in the false name. Ray also provided Fernandez an additional $50,000 in December 1981. Ultimately, after nearly two years as a fugitive, Fernandez was apprehended in Brazil in March 1983 and extradited to the United States the following year.

In October 1983, while Fernandez was in custody in Brazil, Rafael Corona aranged to have the remaining shares of bank stock, which were registered in the name

of Alma Robles, transferred to two Panamanian corporations.

In response to the Government's evidence, the Coronas' defense was that they did not know Fernandez was in the marijuana business; they did not know he, rather than Alma Robles, was the real purchaser of the Sunshine State Bank; and they did not commit any of the allegedly criminal acts attributed to them, other than Ray's trip to New Orleans, which had no criminal purpose.

The counts in the superseding indictment of which Ray Corona was convicted charged him with two Travel Act offenses: (1) the April 1981 trip to New Orleans and conduct thereafter in assisting Fernandez to make bail (Count VI), and (2) a December 1981 telephone conversation with Samos to arrange for additional payments for the bank stock and the wiring thereafter of $50,000 for Fernandez while he was a fugitive (Count VII). In the indictment's RICO Counts (Counts I and II) against Ray, the Government alleged as predicate acts numerous mail fraud acts (subsequently invalidated under the *McNally* decision), the two Travel Act charges mentioned above, and three Travel Act offenses in 1977 and 1978 (now barred under the statute of limitations) involving the wiring of laundered funds from Samos to Ray to purchase the majority interest in the Sunshine State Bank for Fernandez.

The only charge in the superseding indictment of which Rafael Corona was convicted was a Travel Act offense (Count VIII) allegedly involving the mailing of documents between Panama and Miami to transfer the last 20,00 shares of Fernandez's bank stock out of Alma Robles's name and into the names of two off-shore corporations.

Sufficiency of Evidence

In order to establish that the Coronas were guilty of the Travel Act charges under the circumstances alleged,

the Government had to prove that they were aware of Fernandez's "unlawful activity" when their acts occurred. *See United States v. Lignarolo*, 770 F.2d 971, 977 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1948, 90 L.Ed.2d 358 (1986). The Government was also required to prove that they traveled or used a facility in interstate commerce to distribute the proceeds of the unlawful activity, 18 U.S.C. § 1952(a)(1), or to facilitate the unlawful activity, and "thereafter" performed or attempted to perform the intended distribution or facilitation, 18 U.S.C. § 1952(a)(3).

On appeal, the Court must review the evidence in a light most favorable to the Government to determine whether a reasonable fact-finder could have reached a conclusion of guilt beyond a reasonable doubt. *United States v. Sanchez*, 790 F.2d 1561, 1563 (11th Cir. 1986).

The Government and the Coronas agree that with the mail fraud charges now dismissed under *McNally* the convictions either stand or fall on the Travel Act allegations.

Travel Act:

The Travel Act, 18 U.S.C. § 1952, identifies as subject to criminal sanctions:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> . . .
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified . . . .

> (b) As used in this section "unlawful activity" means (1) any business enterprise involving . . . narcotics or controlled substances . . . .

Thus, in a case such as this, a Travel Act conviction must be based on (a) an unlawful activity, generally termed an "enterprise"; (b) knowledge of the defendant of the unlawful activity; and (c) use of interstate commerce (1) to facilitate the carrying on of the unlawful activity or, (2) to distribute the proceeds.

A. *Enterprise*

The Government's case under the Travel Act rested on an expansive interpretation of section 1952(b)'s concept of a "business enterprise involving marijuana" to extend the enterprise until Fernandez's arrest in Brazil in March 1983. The Coronas contend that the business enterprise ended around March 1981, when Fernandez's arrest took him out of the marijuana business. Their more restrictive interpretation equates "business enterprise involving marijuana" and marijuana business, although they admit that the enterprise may encompass ancillary functions such as obtaining boats, planes, and getaway vehicles necessary to the enterprise's objectives.

When, under circumstances such as presented here, a Travel Act "enterprise" *ends* is a question of first impression. The Travel Act does not define the term "enterprise," and the case law simply describes it generally as "a continuous course of conduct, rather than a sporadic, casual course of events." *United States v. Lignarolo*, 770 F.2d at 979; *see also United States v. Jones*, 642 F.2d 909, 912 (5th Cir. Apr. 1981) ("an ongoing business enterprise").[1]

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (in banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

The three alleged Travel Act violations occurring in 1977 and 1978, which served only as RICO predicate acts, plainly occurred during the enterprise. Even under the Coronas' restrictive reading of section 1952(b), the "enterprise" lasted until March 1981.

The enterprise continued for at least a while after Fernandez's arrest, as his confederates mismanaged the business and failed to pay the Colombians what was owed them. The day-to-day operation of a drug enterprise, like any other business, surely includes paying its debts. Ray Corona's trip to New Orleans occurred during this period and thus happened during the enterprise. Likewise, as Fernandez liquidated his holdings (bought with earlier drug proceeds) to pay the Colombians, he was meeting his organization's obligations to pay for the marijuana earlier taken on consignment.

The more difficult question is whether the enterprise continued while Fernandez was a fugitive, the time during which Ray Corona's December 1981 telephone conversation and subsequent mailing of funds for Fernandez occurred. Not every drug enterprise remains ongoing until each participant, no matter how minor, is apprehended. Here, however, an organizational kingpin assumed a false identity and remained a fugitive, liquidating and living off his earlier illegal earnings with the knowing assistance of his money launderer and banker, both of whom had previously facilitated either the laundering (Samos) or distribution of the proceeds (Ray Corona, as discussed later) of the kingpin's marijuana earnings. Fernandez's unlawful activity had merely moved into a new phase: avoidance of prosecution and punishment. Under these circumstances, we hold that for Travel Act purposes the "business enterprise involving marijuana" continued.

B. *Ray Corona*

With the statute interpreted in this way, it becomes clear that all of the Travel Act violations alleged against Ray Corona occurred during the enterprise.

C. *Raphael Corona*

The single Travel Act charge against Rafael Corona, however, involved an October 1983 event. This was after Fernandez's fugitive period ended, beyond the time when even the Government admits that the enterprise had ceased. A basic ingredient of the Government's Travel Act case against Rafael Corona was missing. His conviction cannot stand because no Travel Act "enterprise" existed when his acts occurred. Therefore, it is unnecessary to discuss the other elements which would be necessary to sustain his conviction.

D. *Knowledge of Unlawful Activity*

A trier of fact could conclude that after Fernandez's indictment and March 1981 arrest on drug charges, Ray Corona was aware of Fernandez's unlawful activity. Both of his Travel Act convictions resulted from events occurring *after* Fernandez's arrest.

The additional three Travel Act offenses, which were barred by the statute of limitations but were nonetheless predicate acts in the RICO counts, occurred in 1977 and 1978, well *before* the arrest. There was, however, sufficient evidence presented at trial to establish that even at these early dates Ray Corona was aware of Fernandez's marijuana activity. Evidence, in a light more favorable to the Government, showed the following:

(1) Ray Corona was aware that Fernandez accumulated great wealth in a short time with little legitimate income.

(2) He knew that Fernandez kept at least $1,000,000 in cash in his home safe.

(3) He was aware that the cash which Fernandez used to buy the Sunshine State Bank was sent out of the country, through Samos in Panama, and back into this country, a procedure suggestive of laundering.

(4) He counseled Fernandez to use Alma Robles as "figurehead" purchaser of the bank because Fernandez would not withstand the Comptroller of Currency's scrutiny.

(5) Ray received expensive gifts and large loans from his close business associate and personal friend, Fernandez.

(6) He counseled Fernandez to use a "front" business for investment purposes.

(7) There was testimony about conversations Ray Corona had with Fernandez and his associates in the drug trade about the sources and amounts of their incomes.

Although some of the testimony, standing alone, might have appeared ambiguous, the evidence in its entirety strongly suggested that Ray Corona was aware of Fernandez's true occupation. A reasonable juror could have concluded beyond a reasonable doubt that Ray Corona knew of Fernandez's drug "brokering" when Ray helped him buy the Sunshine State Bank with laundered money.

E. *Facilitation*

"[T]o facilitate unlawful activity within the meaning of section 1952(a)(3) means *to make easy or less difficult.*" *United States v. Rogers*, 788 F.2d 1472, 1476 (11th Cir. 1986) (emphasis added). The "unlawful activity" here was a "business enterprise involving . . . controlled substances." 18 U.S.C. § 1952(b). As noted, the "enterprise" continued beyond the last importation until Fernandez's arrest in March 1983 in Brazil.

December 1981 telephone call (Count VII)

The ongoing fugitive status of Fernandez, the organizational kingpin, constituted a continuation of the enterprise. The test for determining if the December 1981 telephone call between Samos in Panama and Ray Corona in Miami and Ray's mailing thereafter of checks totalling $50,000 facilitated the continuing enterprise is whether the money "made easy or less difficult" Fernandez's fugitive status. The clear answer is that it did. The Government sufficiently proved this Travel Act charge.

Trip to New Orleans (Count VI)

On the other hand, although Judge Evans does not agree, the Court finds that Ray Corona's trip to New Orleans after Fernandez's arrest and the arrangement thereafter for Guido Eschevarria to assist with Fernandez's bail did not facilitate any unlawful activity. There was no evidence from which the jury could have found beyond a reasonable doubt that Ray did this with the intent to facilitate either Fernandez's return to the marijuana "brokering" business or his ultimate flight from justice. The evidence does not support a conviction on this charge.

Judge Evans would affirm this conviction on the ground that a reasonable jury could have found Ray Corona's intent in helping Fernandez get out of jail was, at least in part, to facilitate Fernandez's handling of the financial affairs of the enterprise.

F. *Distribution of proceeds*

The three Travel Act offenses used solely as RICO predicate acts were alleged to be illegal distributions of proceeds of the enterprise. *See* 18 U.S.C. § 1952(a)(1). These three events arose from wire transfers of money from Panama to Miami in 1977 and 1978 for Fernandez's purchase of the Sunshine State Bank.

Ray Corona need not have been guilty of the marijuana distribution conspiracy to be guilty under 18 U.S.C. § 1952(a)(1) for distribution of the proceeds. Pursuant to subsection (a)(1)—

> The government need not prove that the defendant intended to facilitate the unlawful activity of the enterprise. It is sufficient that the government establish that the defendant, at the time he distributed the proceeds or conspired to do so, knew they were derived from unlawful activity.

United States v. Rogers, 788 F.2d at 1475-76 (citations omitted).

Distribution is not just the disposing of or spending of the proceeds, however, but must involve disbursement to persons who would be entitled to some proceeds from the criminal enterprise. In *United States v. Cole*, 704 F.2d 554, 558 (11th Cir. 1983), this Court employed the definition of "distribution" given in *United States v. Lightfoot*, 506 F.2d 238 (D.C. Cir. 1974). *Lightfoot* explained:

> [T]he word "distribute" carries a connotation of distribution of illegal proceeds to persons in organized crime conspiracies. Certainly the person receiving them must be entitled to them for reasons other than normal and otherwise lawful purchase and sale of goods at market prices.

Id. at 242. The court in *Lightfoot* held that a participant in a prostitution ring did not "distribute" proceeds of the unlawful activity when he crossed into another state and purchased a car from a dealer having no knowledge of the illegal activity. The court noted, however, that it would have faced "a very different case if defendant had bought the car during interstate travel and given it to one of his prostitutes as compensation." *Id.*

Here there was more than a normal purchase and sale. Ray Corona helped Fernandez buy controlling interest in

a bank under extremely dishonest circumstances with laundered drug money. Such a purchase is in reality part of the laundering process. For his role in the purchase and in running the bank for Fernandez, Ray received a percentage ownership without paying any of the purchase price. In essence, Fernandez bought the bank with drug proceeds and gave a portion of it to Ray. This is precisely the distinction alluded to in *Lightfoot*. Ray Corona "was entitled to [a share of the proceeds] for reasons other than normal and otherwise lawful purchase and sale of goods at market prices." *Lightfoot*, 506 F.2d at 242; *Cole*, 704 F.2d at 558. Although Ray Corona was the *recipient*, he nonetheless was responsible under 18 U.S.C. § 2 as principal in the distribution of proceeds. *See Cole*, 704 F.2d at 558-59.

There was sufficient proof that Ray Corona participated in the distribution of proceeds knowing fully they were derived from Fernandez's marijuana "brokering" business.

Double Jeopardy

Ray Corona contends that *McNally* applies retroactively to his first trial and, once applied, it invalidates all mail fraud predicate acts, thus leaving insufficient evidence to support the RICO conspiracy and substantive RICO charges, and since he purportedly was entitled to an acquittal, his retrial on the amended counts in the superseding indictment subjected him to double jeopardy.

In *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the Supreme Court held that a defendant's retrial after a mistrial due to a hung jury did not subject him to double jeopardy, regardless of whether an acquittal should have been granted for insufficient evidence, because the mistrial did not terminate the original jeopardy. In the Coronas' prior appeal, we held that the mistrial due to a hung jury in the first trial did not terminate jeopardy, and the filing

of the superseding indictment prior to the second trial was permissible. *United States v. Corona*, 804 F.2d at 1570-71.

Whether *McNally*, if applied retroactively, would require acquittal on the original RICO counts is thus of no consequence for double jeopardy purposes. Jeopardy did not terminate in the original trial. The Coronas were convicted on a permissible superseding indictment. They had no vested rights in the original indictment or trial. The double jeopardy claim has no merit.

"Spill-Over" Effect

In *United States v. Peacock*, 654 F.2d 339 (5th Cir. Aug. 1981), *vacated in part on other grounds*, 686 F.2d 356 (5th Cir. Unit B 1982), *cert. denied*, 464 U.S. 965, 104 S.Ct. 404, 78 L.Ed.2d 344 (1983), this Court addressed the question presented when a RICO count contains some invalid predicate acts, as well as some that are clearly valid. We held that if it is clear that the jury found each defendant guilty of at least two predicate acts as is necessary to meet 18 U.S.C. § 1962(c)'s "pattern of racketeering" requirement, the RICO conviction will be upheld. *Peacock*, 656 F.2d at 348.

In the present case, the RICO conspiracy and substantive RICO counts of the superseding indictment charged Ray Corona with eleven predicate acts: five Travel Act and six mail fraud offenses. The district court dismissed the mail fraud predicates and we today reverse one of the Travel Act predicates. This leaves four predicate acts, although only one of them (stemming from the December 1981 telephone call) was charged separately in a Travel Act count and resulted in a conviction. Although Judge Vance does not agree, the Court holds that the verdict leaves no doubt that the jury relied on at least two valid predicate acts.

Ray Corona concedes in his brief that "[t]he sole issue on the mail fraud charges was whether the Coronas

knew that Fernandez was the true investor in the bank" and "as a practical matter, . . . the mail fraud charges subsumed the Travel Act charges." Thus, the events surrounding the mail fraud and Travel Act allegations concerning the bank stock purchase by Fernandez and subsequent sale by him to the Coronas were so intertwined that the jury could not reasonably have found that Ray Corona performed the mail fraud but not the Travel Act conduct.

Even though, given the hindsight of *McNally*, the mail fraud allegations may have been non-criminal conduct, the evidence which supported those charges was admissible under Fed. R. Evid. 404(b) "to set in proper perspective" Ray Corona's conduct as it related to the other charges and the overall scheme. *See United States v. Murphy*, 836 F.2d 248, 255 (6th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 307, 102 L.Ed.2d 325 (1988). Since the evidence was admissible, regardless of whether the acts were criminal, Ray Corona did not suffer prejudice in having to respond to it. The central facts underlying both sets of charges were the same.

Without question, Ray was involved in the events surrounding the Sunshine State Bank transactions. He does not dispute this. The jury plainly found that Ray knew Fernandez was the person whom Ray helped buy the bank stock and from whom Ray later purchased it. The jury could not reasonably have relied on the now-dismissed mail fraud predicate acts concerning these events without also finding Ray Corona guilty of the related Travel Act predicates. Under the circumstances, it is clear that the jury found Ray Corona guilty of sufficient Travel Act predicate acts to support the substantive RICO and RICO conspiracy charges. Judge Vance dissents from the Court's decision in this regard. He would hold that since the jury returned general verdicts on the RICO charges, it cannot be determined whether it based its verdicts on at least two valid predicate acts. He

would thus hold that a new trial is required on the substantive RICO and RICO conspiracy counts. *See United States v. Ruggiero*, 726 F.2d 913, 921-23 (2d Cir.), *cert. denied*, 469 U.S. 932, (1984).

Conclusion

We reverse Rafael Corona's Travel Act conviction (Count VIII) because the evidence was insufficient. We affirm Ray Corona's Travel Act conviction on Count VII. We reverse Ray Corona's Travel Act conviction on Count VI due to insufficient evidence, with Judge Evans dissenting. We affirm his RICO conspiracy (Count I) and substantive RICO (Count II) convictions, with Judge Vance dissenting.

REVERSED AS TO RAFAEL CORONA; AFFIRMED IN PART, and REVERSED IN PART AS TO RAY CORONA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5952

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

RAFAEL L. CORONA, RAY L. CORONA,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(November 13, 1989)

Before VANCE, Circuit Judge, RONEY *, Senior Circuit Judge, and EVANS **, U.S. District Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active serv-

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Orinda D. Evans, U.S. District Judge for the Northern District of Georgia, sitting by designation.

ice on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-853-Cr-KEHOE(s)

UNITED STATES OF AMERICA

v.

RAY L. CORONA and RAFAEL L. CORONA

ORDER ON DEFENDANTS' POST TRIAL MOTIONS

THIS CAUSE came on to be heard upon the defendants' Motion for Judgment of Acquittal pursuant to Rule 29(c) and for a New Trial pursuant to Rule 33, Federal Rules of Criminal Procedure, following the decision by the United States Supreme Court in *United States* v. *McNally*, 107 S.Ct. 2875 (1987). The decision by the Supreme Court in *McNally* was entered after the verdict in the present case and was therefore not available to this court when it ruled on previous motions by these defendants.

After reviewing the pleadings and entertaining the arguments of counsel, it is,

ORDERED AND ADJUDGED as follows:

1. The motions of both defendants to set aside the verdicts and enter judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, are GRANTED as to the mail fraud charges contained in Counts III, IV and V on the basis of *United States* v. *McNally*, supra.

2. The motion of the defendant, RAFAEL L. CORONA, to set aside the verdict and enter judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, is GRANTED on the basis of *United States* v. *McNally*, supra, as to the substantive RICO charge contained in Count II, there being insufficient predicate acts remaining in the indictment to support such a conviction as to RAFAEL L. CORONA in light of this Court's ruling in Paragraph 1, above.

3. The motion of the defendant, RAY L. CORONA, to set aside the verdicts and enter judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, as to Count I (RICO conspiracy) and Count II (substantive RICO), on the basis of *United States* v. *McNally*, supra, is DENIED.

4. The motion of the defendant, RAY L. CORONOA, to set aside the verdicts and enter judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, as to Counts VI and VII (travel and use of facilities in interstate and foreign commerce in aid of racketeering) is DENIED.

5. The motion of the defendant, RAFAEL L. CORONA, to set aside the verdict and enter judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, as to Count VIII (foreign travel in aid of racketeering) is DENIED.

6. The motions of both defendants for a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, are DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that new reports of Pre-Sentence Investigation be prepared in conformity with this Order and that sentencing of both defendants be re-set for Oct 21, 1987 at 1:30 a.m./p.m.

DONE AND ORDERED at, Miami, Dade County, Florida, this 17th day of September, 1987.

/s/ James W. Kehoe
United States District Court Judge

Copies Furnished to:
AUSA Daniel J. Cassidy
AUSA Thomas A. Blair
Donald I. Bierman (for Ray L. Corona)
Theodore Klein (for Rafael L. Corona)
Gregory C. Denaro (for Rafael L. Corona)
Probation Office

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 U.S.C. § 1961, et seq.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954

(relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means of debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incured in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both.,[1], and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance band, or take any other action to preserve the availability of

property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the

availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest

not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by

public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Cervice or

any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervent in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The

Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other atcions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence of the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness

and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed

to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering invsetigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who pro-

duced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to his subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceed-

ing arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identify and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such

petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Supreme Court, U.S.
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No. 89-1076

In the Supreme Court of the United States

OCTOBER TERM, 1989

RAY L. CORONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the verdict of the jury that convicted petitioner on two RICO counts showed that it necessarily had relied on valid predicate acts of racketeering, even though some of the predicate acts alleged at trial were subsequently determined to be invalid.

2. Whether, following his conviction after a second trial, petitioner is entitled to review of his contention that the evidence was insufficient at his first trial, which ended in a mistrial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Brennan v. *United States*, 867 F.2d 111 (2d Cir.), cert. denied, 109 S. Ct. 1750 (1989) . . . 9

Callanan v. *United States*, 881 F.2d 229 (6th Cir. 1989), petitions for cert. pending, Nos. 89-6184 & 89-6203 (filed Dec. 1 and 2, 1989) . . . 11

H.J. Inc. v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989) . . . 10

McCullough v. *United States*, cert. denied, 484 U.S. 947 (1987) . . . 12

McNally v. *United States*, 483 U.S. 350 (1987) . . . 2

Richardson v. *United States*, 468 U.S. 317 (1984) . . . 7, 13

Street v. *New York*, 394 U.S. 576 (1969) . . . 8

Stromberg v. *California*, 283 U.S. 359 (1931) . . . 8

United States v. *Anderson*, 809 F.2d 1281 (7th Cir. 1987) . . . 9

United States v. *Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979) . . . 11

United States v. *Coleman*, 862 F.2d 455 (3d Cir. 1988), cert. denied, 109 S. Ct. 2074 (1989) . . . 13

Cases—Continued: Page

United States v. *Corona*, 804 F.2d 1568 (11th Cir. 1986), cert. denied, 481 U.S. 1017 (1987) 4, 5
United States v. *Kimberlin*, 805 F.2d 210 (7th Cir. 1986), cert. denied, 483 U.S. 1023 (1987) 13
United States v. *Kragness*, 830 F.2d 842 (8th Cir. 1987) 9, 12
United States v. *Lopez*, 803 F.2d 969 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987) ... 9
United States v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989) 12, 13
United States v. *Peacock*, 654 F.2d 339 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983) 9
United States v. *Pepe*, 747 F.2d 632 (11th Cir. 1984) 9
United States v. *Ruggiero*, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984) 12
United States v. *Zauber*, 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989) .. 11, 12
Zant v. *Stephens*, 462 U.S. 862 (1983) 8

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) 7, 13
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 6
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1961(5) 8
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2

Statutes—Continued:

Page

Travel Act, 18 U.S.C. 1952 2
18 U.S.C. 1341 ..... 2, 5

Miscellaneous:

134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) 6

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 885 F.2d 766.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1989. A petition for rehearing was denied on November 13, 1989 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on January 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was con-

victed under the Racketeer Influenced and Corrupt Organizations Act (RICO) of operating a racketeering enterprise and conspiring to do so, in violation of 18 U.S.C. 1962(c) and (d); on three counts of mail fraud, in violation of 18 U.S.C. 1341; and on two counts charging violations of the Travel Act, 18 U.S.C. 1952. After trial, the district court upheld the RICO and Travel Act convictions, but directed a judgment of acquittal as to the mail fraud counts in light of *McNally* v. *United States*, 483 U.S. 350 (1987). Pet. App. 21a-23a. The court of appeals affirmed the convictions on the two RICO counts and one of the Travel Act counts, but reversed the conviction on the other Travel Act count. Pet. App. 1a-18a.

1. Petitioner and his father were, respectively, the vice president and president of the Total Bank in Miami, Florida. In 1976, petitioner became the banker for Jose Fernandez, a major marijuana trafficker in South Florida. Petitioner obtained a credit card for Fernandez even though Fernandez had no credit history and the legitimate business that he ran was not very profitable. As collateral for the card, Fernandez gave petitioner $20,000 in cash wrapped in a paper bag. Pet. App. 2a-3a.

In 1977, Fernandez determined that his businesses would prosper if he owned a bank. Fernandez and his associates discussed buying a bank with petitioner and decided that the purchase should be made in the names of "figurehead" owners to conceal Fernandez's interest from banking authorities. Petitioner and two other persons—Alma Robles, the ex-wife of Fernandez's trusted associate, Steve Samos, and another associate of Fernandez—were selected to be the bank's nominal buyers. Petitioner and his father subsequently learned that the Sunshine State Bank in Miami was for sale. Petitioner's father negotiated the sale. On December 21, 1977, Samos wired $900,000 from Panama to an account controlled by petitioner for

the purchase of the bank (Racketeering Act #20). In January 1978, the sale agreement was executed. In May, the State approved the sale, but directed the buyers to invest an additional $1.1 million in the bank to complete a tender offer to minority shareholders. On May 10, Samos wired $600,000 into an account controlled by petitioner (Racketeering Act #21). On May 16, an additional $550,000 was wired to petitioner's account (Racketeering Act #22). That money came from drug proceeds that Samos had laundered in Panama. During May, petitioner and his father sent three letters that related to the purchase of the bank through the United States mails (Racketeering Acts #34-#36). Petitioner was made President and Chairman of the Board of the Sunshine State Bank, but he subsequently relinquished the latter position to his father. Pet. App. 3a-4a; Gov't C.A. Br. 8-11.

In March 1981, Fernandez was arrested on federal drug charges and confined in New Orleans, Louisiana. Several days later, petitioner traveled to New Orleans and met both Fernandez and Fernandez's local attorney, ostensibly to help Fernandez make bail (Racketeering Act #17; Count VI (Travel Act)). Petitioner returned to Miami, however, after Fernandez said that petitioner's presence might reveal Fernandez's connection with the Sunshine State Bank to federal agents. Pet. App. 5a.

Shortly afterwards, Fernandez was released on bail, but he and his family were kidnapped and taken to Colombia by a Colombian drug family to whom Fernandez owed drug debts. The Colombians forced Fernandez to liquidate most of his holdings to pay his debts. During his captivity, Fernandez, through Samos and others, negotiated the sale of his bank shares to petitioner and his father. In June 1981, Fernandez sold 49,900 shares to petitioner and his father for $200,000 and a note for $420,000. Petitioner sent a $200,000 check to Robles in Panama, which was

cashed and given to Fernandez (Racketeering Act #37; Count III (mail fraud)).

In August 1981, Fernandez escaped from captivity and fled to Brazil. From Brazil, he continued to negotiate the sale of his interest in the bank to petitioner and his father, selling them an additional 9,900 shares for $200,000. In December 1981, Fernandez convinced petitioner to pay him an additional $50,000. On December 22, 1981, Samos called petitioner from Panama and provided him with the name of the company to which the checks would be made payable (Racketeering Act #18; Count VII (Travel Act)). Petitioner sent $50,000 in cashier's checks to one of Fernandez's companies in Panama (Racketeering Act #38; Count IV (mail fraud)). Pet. App. 6a; Gov't C.A. Br. 24. In April 1982, after Fernandez persuaded petitioner to make an additional payment, the Sunshine State Bank sent a $30,000 check to Samos in Panama (Racketeering Act #39; Count V (mail fraud)). Gov't C.A. Br. 25.

2. Petitioner and his father were tried on RICO and RICO conspiracy charges, and on multiple counts alleging violations of the mail and wire fraud statutes and the Travel Act. After the jury could not agree on a verdict following lengthy deliberations, the court declared a mistrial.

Three months later, the government obtained a superseding indictment from the grand jury, which charged petitioner with RICO, RICO conspiracy, three counts of mail fraud, and two counts alleging violations of the Travel Act. The superseding indictment did not change the general thrust of the RICO counts. *United States* v. *Corona*, 804 F.2d 1568, 1569 (11th Cir. 1986), cert. denied, 481 U.S. 1017 (1987). The RICO counts alleged 11 predicate racketeering offenses: (a) the three 1977-1978 Travel Act offenses that related to the wiring of laundered funds from Samos to petitioner to buy the Sunshine State

Bank (Racketeering Acts #20-#22); (b) the three 1978 mail fraud offenses that also related to the purchase of the Sunshine State Bank (Racketeering Acts #34-#36);[1] (c) the 1981 Travel Act offense relating to petitioner's trip to New Orleans to help Fernandez make bail, which was also charged as Count VI (Racketeering Act #17);[2] (d) the three 1981 mail fraud offenses relating to Fernandez's sale of his shares in the Sunshine State Bank and the transfer of money from petitioner to Fernandez while he was a fugitive, which were also charged as Counts III-V (Racketeering Acts #37-#39);[3] and (e) the 1981 Travel Act offense relating to petitioner's transfer of $50,000 to Fernandez while he was a fugitive, which was also charged as Count VII (Racketeering Act #18).

Prior to retrial, petitioner moved to dismiss the superseding indictment on double jeopardy grounds. The district court denied the motion. On interlocutory appeal, the court of appeals rejected petitioner's double jeopardy challenge, holding that petitioner could be retried because the earlier mistrial had not ended the jeopardy that had attached at petitioner's first trial. *United States* v. *Corona*, 804 F.2d at 1570-1571.

Petitioner went to trial and was convicted on all seven counts. Two days after the verdict, this Court held in *McNally* that the mail fraud statute, 18 U.S.C. 1341, did not reach schemes to defraud persons of "intangible right[s]."[4] Based on *McNally*, petitioner moved for a new

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[1] It is agreed that, in light of *McNally*, the RICO convictions cannot rest on these three predicate acts. See Pet. App. 2a, 8a.

[2] Petitioner's conviction on this count was subsequently overturned by the court of appeals. Pet. App. 13a.

[3] The district court subsequently overturned petitioner's convictions on the three mail fraud counts in light of *McNally*. Pet. App. 2a.

[4] Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to

trial and a judgment of acquittal. The district court upheld petitioner's convictions on the two RICO and the two Travel Act counts, but overturned petitioner's convictions on the three mail fraud counts. Pet. App. 21a-23a.

3. The court of appeals affirmed the two RICO convictions and one of the two Travel Act convictions. Pet. App. 1a-18a.[5] The court first determined that the evidence showed that petitioner knew that Fernandez was involved in marijuana trafficking, citing petitioner's knowledge that Fernandez had acquired a substantial amount of wealth without any apparent legitimate source for it; petitioner's knowledge that Fernandez wanted a "figurehead" buyer for the Sunshine State Bank and that he had laundered the funds used to buy it; petitioner's conversations with Fernandez and his associates concerning the sources and amounts of their incomes; petitioner's receipt of expensive gifts and large loans from Fernandez; and petitioner's advice to Fernandez to use a "front" business for investment purposes. Pet. App. 11a-12a. The court also held that the evidence showed that petitioner had participated in the distribution of drug proceeds by helping

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deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

[5] With respect to the Travel Act convictions, the court held that the evidence was sufficient to sustain petitioner's conviction on Count VII, which related to the $50,000 petitioner sent Fernandez in December 1981 while he was a fugitive. Pet. App. 13a. But, by a divided vote, it reversed petitioner's conviction on Count VI, holding that petitioner's trip to New Orleans to help Fernandez make bail did not facilitate the enterprise. *Ibid.* The correctness of the court's rulings on the Travel Act counts is not at issue.

Fernandez buy the Sunshine State Bank with the profits from his marijuana trafficking business. *Id.* at 13a-14a.

The court then held that the jury had properly concluded that petitioner had engaged in a pattern of racketeering activity, even though seven of the 11 charged RICO predicate acts had been invalidated. Pet. App. 16a-17a. It was clear that the jury had properly relied on predicate act #18, the Travel Act offense on which petitioner had been separately charged (Count VII) and convicted, since the court had upheld that conviction. The court concluded that it was also clear that the jury had properly relied on the three 1977-1978 Travel Act offenses that were not separately charged, emphasizing the relationship between the mail fraud counts on which the jury had convicted petitioner and the 1977-1978 Travel Act offenses. The court explained that petitioner had conceded that the sole issue at trial with respect to the mail fraud offenses and the 1977-1978 Travel Act offenses was whether petitioner knew that Fernandez was the true investor in the Sunshine State Bank. *Id.* at 16a-17a. Since the jury had convicted petitioner on the mail fraud counts, the court concluded that "[t]he jury plainly found that [petitioner] knew Fernandez was the person whom [petitioner] helped buy the bank stock and from whom [petitioner] later purchased it." *Id.* at 17a. Therefore, the court concluded that the jury could not reasonably have convicted petitioner on the mail fraud counts "without also finding [petitioner] guilty of the related Travel Act predicates." *Ibid.* Judge Vance dissented on this point. *Ibid.*

Finally, relying on *Richardson* v. *United States*, 468 U.S. 317 (1984), and its previous decision in this case, the court rejected petitioner's contention that his retrial following a mistrial due to a hung jury violated the Double Jeopardy Clause. Pet. App. 15a-16a.

ARGUMENT

1. To obtain a conviction under RICO, the government must show that the defendant engaged in a "pattern of racketeering activity," which is defined as "at least two acts of racketeering activity." 18 U.S.C. 1961(5). Since seven of the 11 charged RICO predicate acts have been invalidated, petitioner contends (Pet. 7-15) that his RICO convictions must be reversed because the jury may have relied on the invalid predicate acts in convicting him. Based on the jury's verdict, however, the court of appeals correctly decided that the jury must have found that petitioner committed the four valid predicate acts.

a. Where a jury is instructed that it may convict on multiple grounds, and one of those grounds is later determined to be invalid, the conviction may stand only if the reviewing court can be certain that the actual ground relied on by the jury was a proper ground. If the reviewing court is not certain of the actual ground relied on by the jury, the conviction must be reversed. See *Street* v. *New York*, 394 U.S. 576, 585-588 (1969); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931); see generally *Zant* v. *Stephens*, 462 U.S. 862, 880-884 (1983). In this case, the court of appeals correctly determined that the jury necessarily found that petitioner committed the four valid predicate acts charged. That is sufficient to uphold his RICO convictions.

First, the court of appeals properly determined that the jury's conviction on Count VII (the Travel Act violation relating to a 1981 telephone call in which petitioner was directed to send money to Fernandez) necessarily constituted a finding that petitioner had committed Racketeering Act #18, because Racketeering Act #18 incorporated the Travel Act allegations of Count VII. The jury's verdict on Count VII thus operated in effect as a

special verdict that petitioner committed Racketeering Act #18. See *Brennan* v. *United States*, 867 F.2d 111, 114-116 (2d Cir.), cert. denied, 109 S. Ct. 1750 (1989); *United States* v. *Kragness*, 830 F.2d 842, 861 (8th Cir. 1987); *United States* v. *Anderson*, 809 F.2d 1281, 1284-1285 (7th Cir. 1987); *United States* v. *Lopez*, 803 F.2d 969, 976-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Pepe*, 747 F.2d 632, 668 (11th Cir. 1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983).

Second, the court of appeals correctly held that the jury's verdict on the mail fraud counts indicated that it must have found that petitioner had committed the other three predicate Travel Act offenses by its verdict on the mail fraud counts. As petitioner conceded in the court of appeals (Pet. App. 16a-17a), the only relevant issue at trial was whether petitioner knew that he was fronting for Fernandez when he bought the Sunshine State Bank. By its verdict, the jury showed that it had concluded that petitioner did know that fact, since it was an essential element of the scheme alleged in the mail fraud counts.[6] Thus, the mail fraud counts subsumed the three Travel Act predicate acts, which were based on transfer of funds from Fernandez's accounts to petitioner's accounts during the

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[6] Those counts charged that petitioner had schemed to locate a bank in South Florida "which could be acquired through nominees by the co-conspirators Jose Antonio Fernandez and Gerardo Jorge Guevara, as hidden owners, with the proceeds of the Fernandez marijuana smuggling syndicate." Indictment at 40, Counts III-V, para. 3(a). The mail fraud counts further alleged that petitioner transferred funds "in order to create the false appearance that the Panamanian nominee was the true purchaser of the majority interest in the stock of the Sunshine State Bank." *Ibid.* Counts III-V, para. 3(d).

negotiations leading to the purchase of the Sunshine State Bank.[7]

Petitioner also contends (Pet. 12-14) that the decision below ignores this Court's recent decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), which held that RICO's requirement of a pattern of racketeering activity means that the predicate acts must be related and constitute a threat of continuing racketeering activity. There is no question that the predicate acts in this case constituted such a pattern. The 1977-1978 Travel Act offenses each furthered the common objective of buying the Sunshine State Bank under false pretenses with the proceeds of Fernandez's marijuana business. And the 1981 Travel Act offense was related to the other three in that it helped Fernandez evade punishment for selling the illegal drugs. Thus, all of the offenses posed the threat of con-

[7] Departing from his position in the court of appeals, petitioner now contends (Pet. 6-7 & n.4) that the predicate Travel Act violations and the mail fraud convictions involved different factual issues. There is no merit to those contentions. Petitioner first observes that the mailings in furtherance of the mail fraud scheme occurred in 1981 and 1982, while the Travel Act predicate acts occurred in 1977 and 1978. Petitioner overlooks the fact that the gist of the mail fraud charges involved the purchase of the Sunshine State Bank in 1978 by means of false pretenses. Petitioner also contends that he did not know that Fernandez was a marijuana dealer until 1981, after the commission of the predicate Travel Act offenses. As the court of appeals concluded, however, the jury had more than ample evidence to conclude otherwise. Pet. App. 11a-12a. In addition, petitioner now argues that the jury made no specific finding that petitioner obtained a distribution of the proceeds of Fernandez's marijuana business. But the mail fraud counts alleged that petitioner schemed to buy a bank with the proceeds of Fernandez's marijuana business while concealing that Fernandez was the true owner (Indictment at 40, Counts III-V para. 3(a) and (d)), and petitioner received stock in the bank as part of the deal.

tinued racketeering activity because they furthered Fernandez's marijuana business.

b. The court of appeals' determination that the jury necessarily found that petitioner committed the valid Travel Act predicate acts, even though the jury made no express findings on them, is consistent with the approach of other courts of appeals. For example, *United States* v. *Zauber*, 857 F.2d 137 (3d Cir. 1988), cert. denied, 109 S. Ct. 1340 (1989), involved a RICO charge that alleged invalid mail and wire fraud predicate acts and valid kickback predicate acts. As in this case, the indictment linked the mail and wire fraud schemes and the kickbacks. Furthermore, although the mail fraud violations were charged separately as substantive offenses, the kickbacks were not charged separately, except as to one defendant. The court of appeals affirmed all of the defendants' RICO convictions. Analyzing the record and the jury instructions, the court concluded that the jury necessarily found that the defendants had committed the valid kickback violations. 857 F.2d at 151-154. Similarly, in *Callanan* v. *United States*, 881 F.2d 229, 234-235 (6th Cir. 1989), petitions for cert. pending, Nos. 89-6184 & 89-6203 (filed Dec. 1 and 2, 1989), a RICO case that involved invalid mail fraud predicate acts and valid bribery predicate acts, the court of appeals held that the jury's conviction of a co-defendant on RICO charges based on bribery with the defendant constituted, in effect, a special verdict that the defendant had committed the valid predicate acts.

Contrary to petitioner's contention (Pet. 11-14), the Third Circuit does not automatically reverse RICO convictions when a predicate act is subsequently found invalid. Petitioner's reliance on *United States* v. *Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), is therefore misplaced. In that case, the court of appeals, pursuant to a government concession, reversed the de-

fendant's RICO conviction following the invalidation of two underlying predicate mail fraud violations. As the Third Circuit subsequently explained in *Zauber* (857 F.2d at 154), the RICO conviction in *Brown* had to be reversed because "it was impossible to determine whether the jury had relied on invalid predicate acts."[8]

Petitioner's contention (Pet. 8-10) that the decision below conflicts with the decisions of other courts of appeals is also without merit. Contrary to petitioners' contention, none of the decisions on which he relies held that where a predicate racketeering act has been determined to be invalid, the RICO conviction will be sustained only if the jury made an express finding of guilt on at least two other predicate acts. Rather, each court has reversed only after finding that the record was unclear as to whether the jury had found two valid predicate acts showing a pattern of racketeering activity. Thus, in *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984), the court reversed a RICO conviction because it could not "tell from its verdict * * * what decisions [the jury] made with respect to the eight predicate acts." The court distinguished cases like this one, where "the court was assured by the separate convictions that the jury had found defendant guilty of committing at least two of the predicate acts alleged in the indictment." 726 F.2d at 922. Similarly, in *United States* v. *Kragness*, 830 F.2d at 861, the court stated that "we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed." And in *United States* v. *Mandel*,

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[8] In *McCullough* v. *United States*, cert. denied, 484 U.S. 947 (1987), Justices White and Brennan would have granted certiorari to resolve a conflict between *Brown* and cases from other circuits concerning the effect of the invalidation of a predicate racketeering act on a racketeering conviction. In light of *Zauber*, the Third Circuit is no longer in conflict with the other circuits.

862 F.2d 1067, 1074 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989), the court reversed a RICO conviction because it could not determine "whether the [invalid] mail fraud or the [valid] bribery charges of Count 21, or both, were considered by the jury." Under the facts of this case, in contrast, the court of appeals was able to conclude that "the verdict leaves no doubt that the jury relied on at least two valid predicate acts." Pet. App. 16a.

2. Petitioner also contends (Pet. 15-17) that the court of appeals erred by not evaluating the sufficiency of the evidence at his first trial, which ended in a mistrial. There is no merit to that claim. In *Richardson* v. *United States, supra*, the Court stated that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325. The Court further held that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which the defendant was subjected." *Id.* at 326. The Court added that "there is no possibility that a defendant's double jeopardy rights will be violated by a new trial" following a mistrial. *Id.* at 326 n.6. Accordingly, the court below correctly concluded, as it had in its previous decision in this case, that "the mistrial due to a hung jury in the first trial did not terminate jeopardy," Pet. App. 15a, so that petitioner's "double jeopardy claim has no merit," *id.* at 16a.

No court of appeals has interpreted the Double Jeopardy Clause differently in light of *Richardson*. To the contrary, they have recognized, like the court below, that their "task is limited to considering the sufficiency of the evidence at the second trial." *United States* v. *Coleman*, 862 F.2d 455, 460 (3d Cir. 1988), cert. denied, 109 S. Ct. 2074 (1989); *United States* v. *Kimberlin*, 805 F.2d 210, 230 (7th Cir. 1986), cert. denied, 483 U.S. 1023 (1987). In the

absence of any conflict among the circuits with respect to the proper application of this Court's decision to double jeopardy claims raised after a second trial, there is no need for this Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States
OCTOBER TERM, 1989

RAY L. CORONA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY MEMORANDUM FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. FACTS AND DECISION BELOW	1
II. EXISTENCE OF CONFLICTS	3
III. DOUBLE JEOPARDY	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Brennan v. United States, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989) 4
Callanan v. United States, 881 F.2d 229 (6th Cir. 1989), *petitions for cert. pending*, Nos. 89-6203/6184 (filed December 1 and 2, 1989) 4
Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987) 4
McCulloch v. United States, 484 U.S. 947 (1987) 5
Richardson v. United States, 468 U.S. 317 (1984) 5
United States v. Alexander, 850 F.2d 1500 (11th Cir. 1988), *vacated and remanded*, 109 S.Ct. 3236 (1989), *on remand*, 888 F.2d 777 (11th Cir. 1989) 4
United States v. Anderson, 809 F.2d 1281 (7th Cir. 1987) 4
United States v. Brown, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) 4
United States v. Erwin, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986) 4
United States v. Gulledge, 739 F.2d 582 (11th Cir. 1984) 5
United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988) 3
United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) 3, 4
United States v. Lopez, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987) 4
United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989) 3
United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983) 4
United States v. Pepe, 747 F.2d 632 (11th Cir. 1984) 4
United States v. Ruggiero, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) 3
United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989) 5

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REPLY MEMORANDUM FOR PETITIONER

I. FACTS AND DECISION BELOW

The Brief for the United States in Opposition ("Gov't Brief") conveys the mistaken impression that the three Travel Act predicates on which the jury made no findings were *subsumed* within mail fraud counts (later dismissed) on which the jury convicted. (*See* Gov't Brief 9-10). The Government's Brief implies that the Travel Act predicates were thus in the nature of lesser included offenses, such that the jury's verdict on the now-dismissed mail frauds represented a finding on every element of the Travel Act predicates. This is completely wrong.

First of all, the mail fraud counts on which the jury convicted all involved events occurring in 1981 and 1982. The Travel Act predicates in question all involved events

occurring in 1977 and 1978.[1] Second, the Travel Act predicates required proof of critical elements not required for mail fraud: (1) that petitioner Corona knew Fernandez was a marijuana dealer, and (2) that Corona knowingly helped Fernandez distribute the proceeds of his marijuana business.[2]

The Government's proof that Corona knowingly distributed proceeds of a marijuana business was questionable. The Court of Appeals ruled that the evidence was legally sufficient to show that Corona knew Fernandez was a marijuana dealer, but emphasized that the Government's proof was much stronger in 1981 and 1982, *after* Corona learned of Fernandez's arrest for marijuana dealing.[3]

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[1] *See* Petition 4 n.3; and compare Counts III, IV and V of the indictment (the 1981 and 1982 mail frauds on which the jury convicted) with predicate Racketeering Acts 20, 21 and 22 (the Travel Act predicates on which the jury made no findings).

[2] The Government claims that Corona conceded in the Court of Appeals that the only issue on both the Travel Act counts and the mail fraud counts was whether Corona knew that someone was fronting for Fernandez when he bought the Bank. (*See* Gov't Brief 9). Corona did no such thing. Corona argued in the Court of Appeals that "[i]f the defendants *prevailed* on the mail fraud charges, conviction on the Travel Act charges would be impossible." (Corona Brief on Appeal 68) (emphasis added). The Court of Appeals erroneously inverted Corona's argument, claiming that Corona had conceded that *conviction* on the mail fraud charges would necessitate findings of guilt on the Travel Act charges. (*See* App. 17a). Corona never made such a concession and, in fact, most of the Court of Appeals opinion was a response to Corona's argument that the evidence of his knowledge of Fernandez' marijuana dealings was insufficient.

[3] The Court of Appeals said:

> A trier of fact could conclude that after Fernandez's indictment and March 1981 arrest on drug charges, Ray Corona was aware of Fernandez's unlawful activity. Both of his Travel Act convictions resulted from events occurring *after* Fernandez's arrest. (App. 11a) (emphasis in original).

The Government argues that "the jury had more than ample evidence to conclude" that Corona knew Fernandez was a drug dealer

The jury's verdict on the 1981 and 1982 mail frauds may not even remotely be said to represent a jury finding on the elements of Travel Act violations alleged to have occurred in 1977 and 1978, and the Court of Appeals never said otherwise. Instead, the Court of Appeals said that if the jury acted reasonably, it would have found that the Travel Act predicates were proven. Thus, the Court of Appeals said, "the jury could not *reasonably* have found that Ray Corona performed the mail fraud but not the Travel Act conduct," (App. 17a) (emphasis added); and later the Court of Appeals said, "The jury could not *reasonably* have relied on the now-dismissed mail fraud[s]" without also relying on the Travel Act predicates. (App. 17a) (emphasis added).

In sum, the Court of Appeals based its decision not on what this jury actually found, but on what the Court of Appeals thought a *reasonable* jury would have found.

II. EXISTENCE OF CONFLICTS

The Government's effort to reconcile the seventeen recent court of appeals RICO decisions cited in the petition fails hopelessly. Each of these seventeen decisions presents the question of whether a RICO conviction may stand when some, but not all, of the predicate acts submitted to the jury are later ruled invalid. The decisions are all over the lot.

Many cases reverse for a new trial unless there is a separate jury finding on at least two of the valid predicate acts.[4] These cases specifically decline to analyze the

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even in 1977 and 1978. (*See* Gov't Brief 10 n.7). But the jury never made a finding on this issue; and it is the jury, not the Government or the Court of Appeals, which must decide whether Corona is guilty of the Travel Act predicates in 1977 and 1978.

[4] *See, e.g., United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3190 (1989); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984).

evidence with a view to deciding what a reasonable jury would have done.[5]

In square conflict with these holdings are the decision of the Eleventh Circuit in this case and the decision of the Sixth Circuit in *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989), *petitions for cert. pending*, Nos. 89-6184/6203 (filed December 1 and 2, 1989), which affirmed RICO convictions in spite of the absence of a *jury* finding on two or more valid predicates. These two circuits now permit the Court of Appeals to affirm if, in the judgment of the Court of Appeals, a *reasonable* jury would have made such findings.[6]

Many cases hold that where there are separate findings on two valid predicates, the RICO conviction should be affirmed.[7] In square conflict with this line of cases, the Third Circuit has ruled that a new trial is necessary even if the jury did make separate findings on two valid predicates. *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978). This is because two predicates are not sufficient to support a RICO conviction. The jury must also find a "pattern." The jury may have relied on invalid predi-

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[5] *See, e.g., United States v. Kragness*, 830 F.2d at 861.

[6] In *Callanan*, the Court of Appeals inferred from the convictions of an alleged intermediary in a series of bribes that the jury would have found the ultimate recipient guilty of the same series of bribes. *Callanan v. United States*, 881 F.2d at 234-35.

[7] *See, e.g., Brennan v. United States*, 867 F.2d 111 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989); *United States v. Lopez*, 803 F.2d 969 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987); *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983); *United States v. Anderson*, 809 F.2d 1281 (7th Cir. 1987); *United States v. Erwin*, 793 F.2d 656 (5th Cir.), *cert. denied*, 479 U.S. 1991 (1986); *Cooper v. United States*, 639 F. Supp. 176 (M.D. Fla. 1986), *aff'd mem.*, 822 F.2d 63 (11th Cir.), *cert. denied*, 484 U.S. 947 (1987); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984); *United States v. Alexander*, 850 F.2d 1500 (11th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3236 (1989), *on remand*, 888 F.2d 777 (11th Cir. 1989).

cates in finding a pattern even where two valid predicates remain.[8]

Contrary to the Government's argument (Gov't Brief 12 n.8), *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989), does not alter the rule of *Brown*. *Zauber* cites *Brown* with approval, and distinguishes it on the ground that the jury instructions in *Zauber* permitted guilt findings on invalid mail fraud predicates only if the jury first found a corresponding valid kickback predicate. 857 F.2d at 152. Given that instruction, the setting aside of mail fraud predicates could not have affected the verdict. *Id.* at 154.

III. DOUBLE JEOPARDY

The Government states in its Brief (Gov't Brief 13) that after *Richardson v. United States*, 468 U.S. 317 (1984), "[n]o court of appeals has interpreted the Double Jeopardy Clause" to permit a defendant to raise the issue of sufficiency of the evidence at a first trial ending in a hung jury on an appeal from conviction after a second trial. This is inaccurate. In *United States v. Gulledge*, 739 F.2d 582 (11th Cir. 1984), a case decided after *Richardson*, the court stated that a claim of insufficient evidence at a first trial ending in a hung jury "is not appealable *until* a final decision has been rendered." 739 F.2d at 584 (emphasis added). The court in *Gulledge* considered *Richardson* and concluded that "the effect of the [*Richardson*] decision is that henceforth such claims may not be appealed *before* final judgment." *Id.* at 585 (emphasis added).

As recognized by the court in *Gulledge*, *Richardson* held only that an appeal could not be taken between trials after a hung jury to *prevent* a retrial. *See Richard-*

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[8] Two Justices noted in *McCulloch v. United States*, 484 U.S. 947 (1987) (White and Brennan, J.J., dissenting from denial of certiorari), that *Brown* is in conflict with decisions in other circuits on this point.

son v. United States, 468 U.S. at 326. The question whether the appeal may be taken *after* conviction at a retrial remains open. We respectfully submit that certiorari should be granted to resolve this open question.

CONCLUSION

For all the above reasons, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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